Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-52

In the Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF EDUCATION OF BALTIMORE COUNTY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

CARIN ANN CLAUSS
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

MARY-HELEN MAUTNER
RUTH E. PETERS
GREGORY O'DUDEN
Attorneys
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-52

BOARD OF EDUCATION OF BALTIMORE COUNTY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

QUESTION PRESENTED

Whether this enforcement action under the Equal Pay Act was barred because of the government's alleged failure to comply fully with internal agency guidelines, where the purpose of the guidelines was adequately served and petitioner suffered no prejudice.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

American Farm Lines v. *Black Ball Freight Service*, 397 U.S. 532	4
Brennan v. *Ace Hardware Corp.*, 495 F.2d 368	4
Brennan v. *Lord & Taylor, Inc.*, 76 Lab. Cas. (CCH) ¶ 33,234	4
Marshall v. *Krystal Co.*, 23 Wage and Hour Cas. (BNA) 551	4
United States v. *Caceres*, 440 U.S. 741	4
United States v. *Locker*, 448 F.2d 417	4
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260	4

Statute:

Equal Pay Act, 29 U.S.C. 206(d)	1

Miscellaneous:

Field Operations Handbook of the Wage and Hour Division, United States Department of Labor	3, 4, 6

PREVIOUS PAGE WAS BLANK

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the district court (a portion of which is reprinted at Pet. App. 5a-32a) is reported at 462 F. Supp. 535.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1980. A petition for rehearing was denied on April 9, 1980. The petition for certiorari was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May 1976, the Secretary of Labor commenced the present action to enjoin petitioner from violating the Equal Pay Act, 29 U.S.C. 206(d), by paying female custodial employees a lower wage than male custodial employees for work that was substantially equal.[1] The Department of Labor began its investigation of petitioner's employment practices in 1973. In May and June of that year, a Department compliance officer visited three of petitioner's schools and interviewed various employees. He learned that petitioner employed two unequally paid categories of custodial employees and that the lower-paid women in one category were performing work substantially equal to that of the higher-paid men in the other category (Pet. App. 8a).

---

[1] After this suit was instituted, enforcement responsibilities under the Equal Pay Act were transferred from the Secretary of Labor to the Equal Employment Opportunity Commission, which was substituted as a party.

Through meetings and letters, the compliance officer explained to petitioner the violation of the Act and the need to eliminate the existing wage differential (Pet. App. 8a-9a). Petitioner denied that it was violating the Act and requested further investigation (*id.* at 9a). The compliance officer subsequently visited three more schools and again found violations. He then met with petitioner to discuss his conclusions and the steps necessary for compliance (*id.* at 10a-11a). When petitioner once again asked for additional investigation, the compliance officer responded that such action would not be fruitful (*id.* at 12a). He told petitioner that the investigation was over, and warned that the file would be submitted for possible litigation if the violations continued (*id.* at 12a, 29a).

At this point, the file was in fact sent to the Office of the Solicitor of Labor, which referred it back for additional factual development in preparation for litigation (Pet. App. 12a). Pursuant to that instruction, the compliance officer visited 11 additional schools in 1974 (*ibid.*). After finishing his 1974 visits, the compliance officer advised petitioner that violations of the Act were still occurring, and he was informed that petitioner's position remained unchanged (*id.* at 12a-13a).

In March 1975, the Solicitor's Office notified petitioner that the investigation had been completed, and it invited petitioner to discuss the matter further before legal action was taken (C.A. App. 46). A meeting between the parties was held in April 1975, but petitioner's position remained unaltered (Pet. App. 14a). In March 1976, petitioner proposed that it would modify its practices if a suit for back wages were not pursued (*ibid.*). The Department

declined this proposal and initiated the present action (*id.* at 14a).

2. Following a bench trial, the district court held that the wage difference between petitioner's male and female custodians violated the Equal Pay Act. The court rejected petitioner's argument that the Department was estopped from bringing suit because it had departed from the guidelines set out in its Field Operations Handbook (FOH) by failing to conduct a "final conference" with petitioner before filing suit and by instituting litigation to recover back wages after petitioner offered to comply with the Act in the future. Finding that the Department had adequately observed its guidelines and that petitioner had not been prejudiced by any deviation from the literal terms of the FOH (Pet. App. 29a-32a), the court enjoined petitioners from violating the Act and directed payment of $578,214.65 in back wages (*id.* at 33a-34a).

On appeal, petitioner did not contest the district court's findings and conclusions as to the Equal Pay Act violation, but it did challenge the rejection of its defense that suit was barred by the Department's failure to comply with its own guidelines. The court of appeals affirmed, concluding "[u]pon careful review and consideration of the record[] * * * that the district court [had] addressed [this] issue[] thoroughly and that [its] findings and decision[] * * * are correct" (Pet. App. 2a-3a).

ARGUMENT

Petitioner contends that the Department is foreclosed from enforcing the Equal Pay Act against it because of the alleged failure to follow internal departmental guidelines contained in the Field Operations Handbook. This contention is without merit.

1. Petitioner first claims (Pet. 7-9) that the suit is barred because the Department failed to abide by Section 53b01 of the FOH, which provides for the compliance officer to hold a "final conference" with the employer at the close of an investigation (Pet. 3). However, even assuming that this provision of the FOH is binding on the Secretary,[2] the courts below

[2] Because the Department's actions adequately complied with the FOH guidelines and resulted in no prejudice to petitioner, this case does not present the question whether the FOH provisions are binding rules of agency procedure. In any event, the courts below correctly determined (Pet. App. 25a-29a) that the FOH does not establish enforceable rules that, if breached, necessarily void the agency's action. First, the Department "was not required by the Constitution or by statute to adopt any particular procedures or rules * * *." *United States* v. *Caceres*, 440 U.S. 741, 749 (1979). Moreover, the FOH provisions are not publicly promulgated regulations with the force and effect of law, but rather are merely internal guides for conducting the agency's business. See *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974); *Marshall* v. *Krystal Co.*, 23 Wage and Hour Cas. (BNA) 551, 552 (E.D. Tenn. 1977); *Brennan* v. *Lord & Taylor, Inc.*, 76 Lab. Cas. (CCH) ¶ 33,234 (S.D. N.Y. 1975). Thus, these provisions "were not intended primarily to confer important procedural benefits upon individuals * * *." *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970); see also, *e.g.*, *United States* v. *Locker*, 448 F.2d 417 (10th Cir. 1971). Furthermore, petitioner has not claimed that it detrimentally relied on the FOH or that such reliance would have been reasonable. Finally, the interest of petitioner that assertedly is protected by the FOH guidelines plainly does not rise to the level of the interests advanced in the cases upon which petitioner relies (Pet. 7), such as *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (due-process right of deportable alien). Hence, this is not "a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *United States* v. *Caceres*, *supra*, 440 U.S. at 752-753.

properly found (Pet. App. 29a) that the Department's compliance officer adequately satisfied the FOH "final conference" procedure. This essentially fact-bound determination does not warrant further review by the Court and, in any event, is amply supported by the record.

At a final conference conducted at the conclusion of the fact-finding phase of an investigation, "the compliance officer is to inform the employer of the results of the investigation, explain the steps necessary for compliance if violations are found, and attempt to obtain an agreement for future compliance" (Pet. App. 15a). The record clearly shows that in 1973 petitioner was advised of the violations that had been discovered and the steps necessary to comply with the Act (*id.* at 8a-12a). The compliance officer also informed petitioner that he had finished his investigation and that the case was being referred for litigation (*id.* at 12a, 29a). Petitioner consistently responded that it was not out of compliance with the Act (*id.* at 9a, 11a). The subsequent visits in 1974 neither altered any of the compliance officer's conclusions nor affected petitioner's position (*id.* at 11a-12a). In these circumstances, "any additional 'final conference' in 1974 would have almost surely been quite perfunctory" (*id.* at 30a).

Moreover, petitioner has failed to demonstrate that it was prejudiced by the failure to conduct a further "final conference" in 1974. The relief entered by the district court in this case merely "order[ed] [petitioner] to comply with the Equal Pay Act * * *[,] to continue personnel practices which it ha[d] already voluntarily adopted[,] * * * [and to provide as back wages the amounts that] it would have already paid" if "[it] had come into compliance in 1974" (Pet.

App. 30a). Thus, "other perhaps than the expense of litigating a possibly unnecessary lawsuit"—a suit petitioner has now lost—this litigation "impose[d] no greater burden on [petitioner] than voluntary compliance in 1974" (*ibid.*).

Nor, contrary to petitioner's assertion (Pet. 8-9), was it deprived of notice of the violation and an opportunity to be heard. As discussed above, petitioner was fully apprised both of the violation of the Equal Pay Act and the measures necessary to conform to the Act. Notwithstanding petitioner's apparent suggestion, the "final conference" was not designed to offer a due process hearing prior to the initiation of a lawsuit. Rather, a plenary hearing was assured to petitioner in court; petitioner was afforded that judicial hearing and failed to prevail on the merits.

2. Petitioner also asserts (Pet. 9) that its eventual offer to comply with the Act should bar the Department from bringing suit under Section 81b03 of the FOH (*id.* at 3-4), which provides that, as a general rule, an injunction will not ordinarily be sought where an employer has come into voluntary compliance even though back wages have not been paid. As the district court explained (Pet. App. 31a), however, this provision was intended to conserve government resources, not to confer enforceable rights on employers. At all events, the court correctly concluded (*id.* at 32a) that Section 81b03 is now obsolete because it was written at a time when the Department could seek only prospective relief and could not obtain back wages (*id.* at 17a & n.18).[3] To require adherence to that guideline under the Act as amended would seriously undermine the "statutory power to

[3] The Department of Labor is currently revising the FOH to remove this obsolete guideline.

seek and insure payment of back wages to employees" (*id.* at 32a). Especially since petitioner had not detrimentally relied on the existence of the guideline, the courts below correctly determined that the Department "in this instance is not estopped from prosecuting this action" to enforce the Equal Pay Act (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

CARIN ANN CLAUSS
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

MARY-HELEN MAUTNER
RUTH E. PETERS
GREGORY O'DUDEN
Attorneys
Department of Labor

SEPTEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 327705 69